FEDERAL INCORPORATION OF INTERSTATE CORPORATIONS

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As a preface to my necessarily brief discussion of the topic of the evening, I shall assume that combinations, both of men, money and allied interests, exist and are to continue as a logical and inevitable accompaniment of the vast and rapid industrial and commercial growth of our country. It is inconceivable that all combinations can be or will be broken up and the people thrown back into the slow, costly and extremely inconvenient conditions that existed before the era of consolidations. Nor should such an attempt be made until every method of control that fairly promises to correct the abuses of combinations and confine their activities within reasonable limits has been tried and found inadequate. Before presenting what I believe is at least a partial remedy for existing conditions and what seems to me may fairly be termed one of the elements of a constructive national policy with reference to combinations, let me in a few words outline the situation for which we are seeking a remedy.

In the last forty years, barely a single generation, there has been a stupendous increase in individual wealth. Before that period the man who owned a million dollars in money or its equivalent was a person of note in his community; then business was to a great extent in the control of individuals and partnerships and the amounts of money involved were comparatively small as we look at business investments to-day. Early conditions were simple, the control of business enterprises was widely distributed. There was little talk of the injury of competition. Machinery with its attendant economic complications had not reached its present high stage of development. To-day we find a complete and radical change in the situation. Never before in the history of the world have we had such tremendous accumulation of wealth in the hands of individuals, never before have such enormous sums of money been invested in the varied avenues of industry. Forty years ago business corporations were scarce and comparatively small affairs when existent.

To-day the corporation is almost as common as was the partnership in those days; and because of our highly developed means of communication and the rapid growth of the country, practically every business of any magnitude is forced to be an interstate business, where before only the greatest could engage in interstate commerce with safety and profit. The inevitable result has been that what forty years ago was a satisfactorily handled situation, both industrially and economically, has become magnified by combination and industrial development into a problem that in the minds of thinking men is the most important one with which we have to deal to-day.

When the country was developing and business was preparing to branch out into the new fields that such development promised, it was only natural that business men should turn to the corporation as a desirable means of conducting their affairs, because of its limited liability to individuals and because of the further opportunity it afforded to secure needed capital. At the outset of the increase in corporate form of conducting business the several states apparently had in mind only that sound business laws were desirable. In a short time, however, it became apparent that the corporation was to be the largest individual form of commercial development, and certain of the states, this may be said in fairness, I believe, seeing an opportunity to increase their incomes, adopted less rigid forms for incorporation and began an open bidding for fees from organizers. The unavoidable result quickly followed. The corporations increased, the laws for their regulation became less and less desirable, and certain men who produced nothing have grown rich beyond the dreams of avarice through the workings of these laws. It is not the purpose of this address to criticise nor are these statements made from that standpoint. They are merely a recital of facts which, piled one upon another, have created the problem the people are now called upon to solve.

The federal government, because of the constitution and its limitations, real and fanciful, has so far sat idly by and, with the exception of the Sherman law, has made no effort to curb these activities. The Interstate Commerce Commission, created to deal with rates, is a valuable addition to our legal and administrative system; but to these must be added something supplemental—something which shall reach to the sore spots in our business existence that neither of these regulating agents has thus far touched, and I

feel convinced that compulsory federal incorporation is what the situation demands, and will prove to be the remedy in which lies the cure for the situation as we now face it.

At present we have forty-eight separate jurisdictions, with as many separate and distinct regulating laws, dealing with the same problem in forty-eight different ways as best seems suited to the needs of the several states, regardless of the needs of the country as a whole. To put through uniform corporation laws in each of the states would be an utterly impossible task. The alternative is some regulation by the national government, and federal incorporation seems to me the easiest to accomplish and the quickest and surest in its benefits.

Other means of control have been suggested. Some hold out a form of federal license, others suggest a commission, similar in form to the Interstate Commerce Commission, having for its duties the regulating of business activities and prices.

I shall not comment on these suggestions other than to say that in my judgment either of them would necessarily abrogate to a certain extent the force of the Sherman law, and place in the hands of the executive branch of the government certain quasi-judicial functions. Such a disposition of the question is undesirable when unnecessary, and not to be made except as a last resort.

In the case of federal incorporation, however, these objections are eliminated. We there have simply a federal statute which defines in detail what a corporation shall do before a charter issues and just what it may do as to its financial activities after that charter has been made effective. It defines duties and obligations, prohibits certain things and prescribes in what way permissible things may be done. It makes no effort to name criminal liability for restraint of trade. It provides means for getting an entire publicity of all the business of the concern, and makes the activities of the Department of Justice in punishing the criminal trust simpler and more sure. It strikes at the root of the present evils if of broad enough scope, and, above all, is immediate in its action.

Having this form of regulation in mind I have recently drawn a form of law which has been presented in the House of Representatives and which I shall take the liberty to discuss in detail for a few moments. I am frank to admit that my bill is based on the Massachusetts law which has stood the test of time and proven itself. Several of its provisions are taken as nearly as was possible word for

word from the revised laws of the State of Massachusetts. In addition to those provisions I have added such further sections as seemed desirable until the bill presents sixty-seven sections and provides for complete publicity under the direction and control of the Secretary of Commerce and Labor and the Commissioner of Corporations. It distinctly prohibits the watering of stock or the issue of fraudulent or excessive or unsecured indebtedness. It states in express terms that no business shall be begun by a corporation until its entire capital has been paid in, either in cash or its equivalent in property. It further provides that no stock or scrip dividends shall be issued, that the Commissioner of Corporations shall first approve all issues of stock or bonds after the initial issue by the corporation, it permits the issue of employee's and special stock, it prohibits the issue of any forms of indebtedness which shall run for more than a year and whose total value shall exceed the outstanding securities and its paid-in capital and franchise value, it guards the issue of bonds, it prevents the sale of bonds at a less rate than par, but provides that a bond so sold shall be collectible at par by action in contract, it provides for the issuance, recording and transfer of stock, it has formal provisions for the management of the business of a corporation formed under it, it provides for the liability of officers and stockholders in certain cases, and provides for full publicity.

In addition to these general provisions the act is so framed that where penalties for violation of its several provisions are named they take the joint form of fine and imprisonment. There will always be found many willing to stand a medium fine if that is all standing between them and their desires, but few will care for the year's imprisonment which is added to the fine as a deterring influence. In an endeavor to limit the activities of corporations a section has been included in the act which provides that a corporation going outside its chartered authority to conduct any business shall be dissolved, after hearing and action taken by the attorney-general.

The problem of how to reach the corporation now in existence which would be amenable to the workings of such an act was a serious one, but was met by a section which provides that failure to take advantage of the terms of the act by any such corporation shall result in a fine for the corporation which shall not exceed one-tenth of its total valuation and a penalty for the officers and directors of such corporation which takes the form of a fine not to exceed one

thousand dollars and imprisonment for not less than one year. It prevents the formation of boards of interlocking directors, so-called, by forbidding a director in one corporation subject to the act serving as a director in more than four others, thus confining one man's activities in this line to five corporations, which does not seem unreasonably restrictive. It is also provided that the holding of the stock of another corporation shall be cause for dissolution. And by the final section it is provided that nothing in the act shall be construed as being an avoidance of any obligation or liability that may be imposed by the several states.

The scope of the proposed law is limited to those corporations engaging in any form of interstate commerce whose total valuation exceeds five millions of dollars. The problem in its serious phases is affected only by those corporations whose finances are so great as to make it possible for them to control commodities in price or to control a market, and practically only those whose resources are well above the amount named affect the money market or the economic situation. Smaller corporations can hardly be looked upon as a menace and combination of several of them brings the combined force under the proposed law.

The bill as framed deals with a situation simply. It affects in no particular the force of the Sherman law nor the functions of the Interstate Commerce Commission. It calls for no long investigations. It places corporations on record as to their financial activities and limits their business activities to the exact lines for which they were created. It leaves in the hands of the present forces of the government all the means they now have and adds largely to the fund of knowledge they already possess as to the intimate workings of the "big business" interests.

It is to be expected that objections to such a proposed measure will arise and the greatest of these affects its constitutionality. Hours might be spent in a discussion of this phase of the situation. Suffice it to say for this short discussion of the matter that the same objections would lie to a federal commission or a federal license.

There is one statement which was made by Mr. Chief Justice Marshall, who has done more than any other single jurist to make the Constitution the great working governmental function it now is, which strikes me as being exactly in point: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which

are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." This was said in the case reported in 4 Wheaton at page 420 and has been many times quoted in other cases. It would appear almost too simple to need dogmatic demonstration that the power to produce, which would be given by the proposed law to a manufacturing corporation, is plainly within the unprohibited means referred to by the first Chief Justice.

It is quite impossible in a short talk such as this to do more than touch upon the several things aimed at and hoped to be accomplished through legislation such as I have very briefly outlined. I want to say, however, that, as a general proposition, competition will be found a very good regulator of prices. We must keep competition and we must also acknowledge that modern conditions tend to combination and that combination has been responsible for many of the advantages we as a people are now able to enjoy and which without combination would have remained luxuries to us as they were to our fathers. It might be well as a supplemental measure to describe just what is an illegal and unreasonable restraint of trade, although it would seem that the legal rules are so clear that this would hardly be necessary if the members of the legal profession were frank with themselves and with their clients. But it does seem to be necessary to prescribe some regulations under which enormous industries may be carried on. The men at the head of these industries have asked for some such laws, as witness the statement of Mr. E. H. Gary, who said: "No decent man is desirous of violating the law or of doing anything which is inimical to the public interests. . . . Give us a commission to which we can go and say: 'Here are all the facts; here is what we would like to do; here are the probable results; we do not want to antagonize the law; we do not want to do anything we ought not to do; we want your advice.' " This proposed corporation law provides just what Mr. Gary asks for. All authority is found in the charter of every company incorporated under such a law as this. Its financial activities are limited by the terms of that law. Its business activities are clearly set forth in its charter. It does not have to go before a commission which may give it some authority it ought not to have or deny it something it should have. It merely does as the law says it shall do, no more, no less. A commissioner of corporations, who has no authority to assist it in any way

as a legal officer, sits wholly on the facts. If the corporation oversteps the bounds of its clearly defined rights the matter is placed in the hands of the Department of Justice and action follows. It is not the purpose of such a law to make prosecutions under existing laws altogether unnecessary, nor to make it permissible to do those things now forbidden. It is proposed to establish a stated form under which all corporations may work, to lay before the people at all times the full workings of the financial end of the corporation and to make it possible for publicity to force upon those who would not otherwise accept it, a certain well defined sense of business morality which must work to the alleviation of present oppressive and undesirable conditions.

Conceding for the purpose of this discussion that incorporation is properly within the powers of congress, is it not better to have a well defined law under which all business interests shall act than it is to have the administration of this department of governmental activity in the hands of a quasi-judicial commission that may sit in judgment on each case and make such decisions as will result in a further confusion of rights and obligations? With a corporation law there is no chance for the exercise of individual judgment to the detriment of one case and the advancement of another. With a corporation law all the cards are on the table and the game is an open one for all men to enter, understanding clearly when they start that all are to play it according to the same set of rules.

The enactment of a federal incorporation law would clarify the atmosphere, would supplement the good work now being done by the Department of Justice, would do away with the financial evils which have given us panics in the past and hold out no better promise for the future, and would bring together in working harmony the great financial interests which under the present order of things seem bound to be more or less out of tune with the national government.